TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 222.

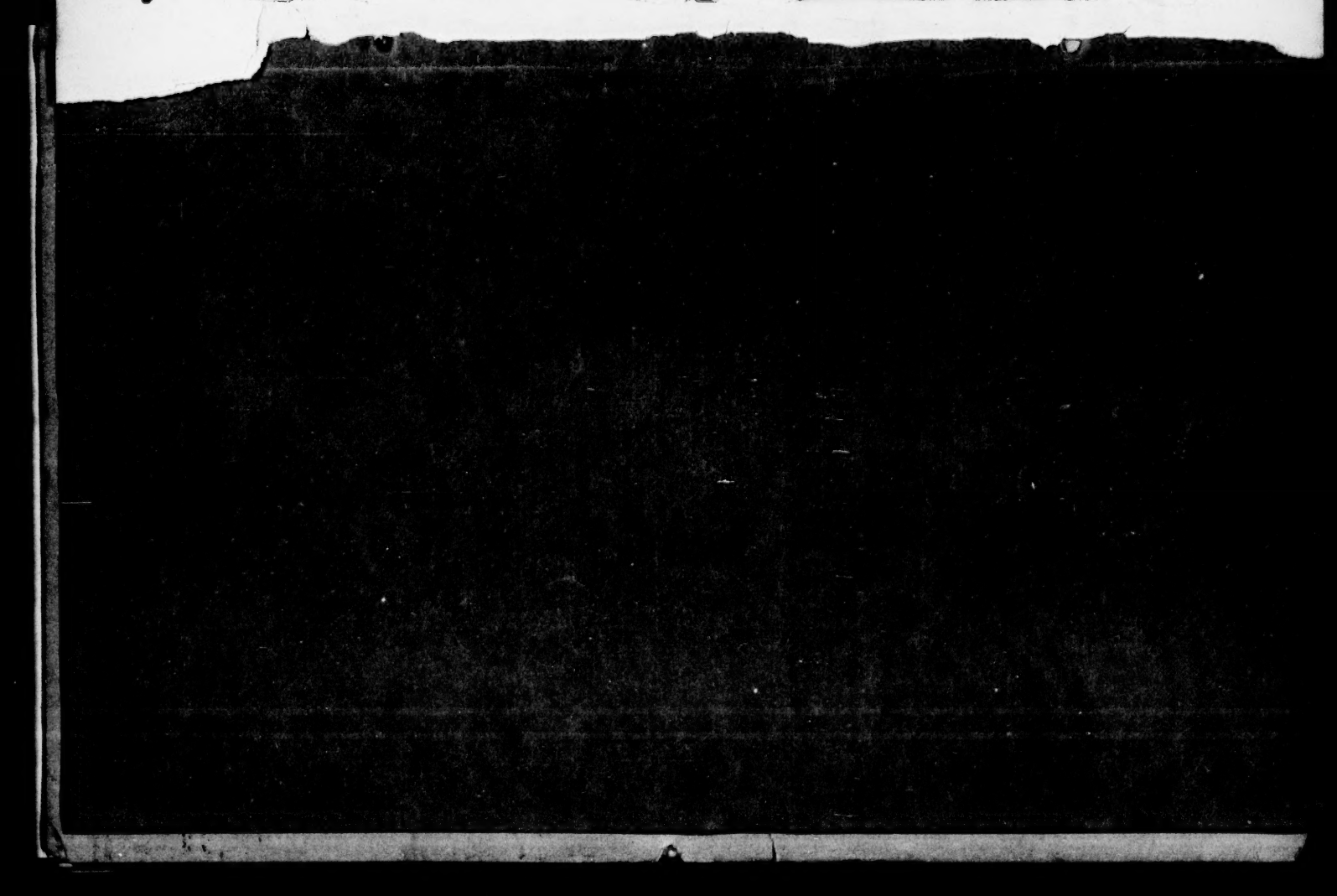
THE FRANKLIN FIRE-INSURANCE COMPANY OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JAMES L. VAUGHAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED AUGUST 13, 1874.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between James L. Vaughan, plaintiff, and the Franklin Fire-Insurance Company of Philadelphia, defendant, a manifest error hath happened, to the great damage of the said Franklin Fire-Insurance Company of Philadelphia, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this thirteenth day of March, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the 98th.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
U. S. Dist. Judge.

The execution of this writ of error appears by the schedule hereto annexed.

RALPH L. GOODRICH, *Clerk.*

2 Be it remembered that on the first day of August, A. D. 1873, came into the clerk's office of the circuit court of the United States for the eastern district of Arkansas James L. Vaughan, by E. H. English, esq., his attorney, and filed therein his complaint against the Franklin Fire-Insurance Company of Philadelphia, which is in the words and figures following, to wit:

JAMES L. VAUGHAN
v.
THE FRANKLIN FIRE-INSURANCE COMPANY OF Philadelphia. } Civil complaint.

The plaintiff, James L. Vaughan, who is a citizen of the State of Arkansas and resident of said eastern district, complains of the Franklin Fire Insurance Company of Philadelphia, the defendant, a corporation organized under the laws of and domiciled in the State of Pennsylvania, and thereupon the said plaintiff avers—

I. That the said defendant is a corporation duly created by and organ-

ized under the laws of the State of Pennsylvania, domiciled in said State, and doing business through its agents in Arkansas.

3 II. That on the 29th day of March, 1873, at Little Rock, in said district, in consideration of the payment by the plaintiff to the defendant of the premium of fifteen dollars, the defendant, by her agents duly authorized thereto, made her policy of insurance in writing, which is annexed as part of this complaint and marked and made "Exhibit A," and thereby insured the plaintiff against loss or damage by fire to the amount of twenty-five hundred dollars *when* "his stock of dry-goods, hats, caps, boots, shoes, notions, and other merchandize not more hazardous, contained on the 1st and 2d floors of the two-story metal-roofed building occupied for merchantile purposes, and situated No. 120 Main street, between 2d and 3d streets, city of Little Rock, Arkansas," other insurances concurrant therewith, (as stated in said policy,) $2,500 in Miss. Valley, and $1,000 in People's, said insurance upon the property above mentioned to continue from the date of said policy, the 29th March, 1873, to the full end and term of two months, the said defendant binding herself by said policy, for the consideration aforesaid, to make good and satisfy unto the plaintiff all such damages or loss which might happen by fire to the property above mentioned during the period of two

4 months aforesaid, not exceeding the sum of twenty-five hundred dollars.

III. That at the time of making said insurance, and from then until the fire hereinafter mentioned, the plaintiff had an interest in the said property insured, as the owner thereof, to an amount exceeding the amount of said insurance, and with the amounts of the other insurances referred to in said policy added, to wit, to *her* amount exceeding the sum of six thousand dollars.

IV. That on the 5th day of May, 1873, and within two months from the date of said policy, the said property covered by said policy of insurance was destroyed by fire in the same building and on the same floors where it was situated when insured as aforesaid, which fire did not happen by the fault of the plaintiff.

V. That at the time said policy was taken out the invoiced value of the said stock of merchandise of the plaintiff and the reasonable actual value thereof was a large sum of money, to wit, about the sum of thirteen thousand dollars, and the reasonable value of the stock on hand at the time said fire occurred, and totally destroyed by said fire, after

5 deducting the amount which had been disposed of in the mean time and the amount saved, was a large sum of money, to wit, the sum of about eleven thousand dollars.

VI. That at the time said fire occurred the premises mentioned in the policy were not in whole or in part occupied for purposes considered more hazardous than at the time of making said insurance, nor had said property so destroyed by said fire been sold or transferred, nor had any change taken place in the title or possession thereof, nor did said fire happen by invasion, foreign enemy, civil commotion, riot, or any military or usurped power whatever, nor did the loss of the plaintiff happen by theft at or after said fire, nor by any violation of any of the conditions of said policy on the part of the plaintiff.

VII. That the plaintiff duly fulfilled all the conditions of said insurance on his part, and immediately after said fire gave notice thereof to the defendant, and before the commencement of this suit, to wit, on or about the 28th day of May, 1873, at said eastern district, gave to the defendant due notice and proof of the fire and loss aforesaid, and duly demanded payment of the said sum of twenty-five hundred dollars.

6 VIII. That more than sixty days have transpired since said loss was ascertained and proved, yet no part of said sum of twenty-five hundred dollars has been paid, and the said sum is due from the defendant to the plaintiff, and the plaintiff prays judgment therefor, and for other relief.

E. H. ENGLISH,
Attorney Plaintiff.

I, Jas. L. Vaughan, do state that I believe the statements of the foregoing complaint to be true in substance and in fact.

JAMES L. VAUGHAN.

Sworn to and subscribed before me this the 1st day of August, 1873.
RALPH L. GOODRICH, *Clerk.*

Process on the within complaint is hereby waived and the appearance of the defendant is hereby entered to the suit with the same effect as if duly served with process thirty days before the next term of the United States circuit court of the *United States*, eastern district of Arkansas.
Aug. 1st, 1873.

ROSE & GREEN,
Attorneys for Franklin Fire-Insurance Co. Philadelphia.

7 EXHIBIT A.

Which policy of insurance is in the words and figures following, to wit:

FRANKLIN FIRE-INSURANCE COMPANY OF PHILADELPHIA.
Office Nos. 435 & 437 Chestnut street.

No 495415. On merchandise. $2,500.

This policy of insurance witnesseth, that the Franklin Fire-Insurance Company of Philadelphia have received of James L. Vaughan, of Little Rock, Arks., fifteen dollars, premium for insuring (according to the tenor of their printed proposals and conditions hereunto annexed) upon the property herein described, viz: On his stock of dry-goods, hats, caps, boots, shoes, notions, and other merchandize not more hazardous, contained on the 1st and 2d floors of the two-story metal-roofed building, occupied for mercantile purposes, and situated No. 120 Main street, between 2d and 3d streets, city of Little Rock, Arkansas, as per application and diagram No. 403 People's Ins. Co., which is his warranty and a part hereof; other insurance concurrent herewith, $2,500, in Miss. Valley and $1,000 in People's, $2,500 @ $\frac{3}{10}$ of 2% = $15.

Now, know all men by these presents that in consideration thereof the capital stock, estate, and securities of the Franklin Fire-In-
8 surance Company of Philadelphia shall be subject and liable to pay, make good, and satisfy unto the said insured, his heirs, executors, administrators, or assigns, all such damage or loss which shall or may happen by fire to the property above mentioned from the 29th March, 1873, to the full end and term of two months, and also for the full end and term of any future time or times for which a premium of insurance shall be paid and endorsed on this policy, or otherwise acknowledged in writing by the secretary or other authorized officer of the said corporation for the time being

not exceeding the sum of twenty-five hundred dollars, or such other sum or sums as by such endorsement or written acknowledgment shall at any future time or times aforesaid be assumed by the said corporation, unless the said company shall, within sixty days after the proof of such damage or loss, give directions for restoring said property, if building or buildings, to as good condition as it or they shall have been in immediately before being so injured by fire, or if merchandise or other personal property, shall furnish the said insured with a like quantity of any or all of said goods, and of the same quality as those so injured by fire, or shall make good the damage or loss by paying therefor the true and actual cash value at the time the loss shall happen, according to the estimate thereof, to be made by arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; provided that if the premises above mentioned shall at any time when said fire shall happen be, in whole or in part, occupied for purposes considered more hazardous in the printed proposals and conditions hereunto annexed than at the time of making such insurance, except liberty so to occupy them be expressly stipulated for by writing as aforesaid, or if the property hereby insured, or any part thereof, or any interest therein, shall have been sold or transferred, or any change shall have taken place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, this policy and every clause, article, and thing therein contained shall be void and of no effect; nor shall this policy have any force or effect if assigned, unless such assignment be made within thirty days after the transfer of the property, and allowed by the company agreeable to article iii of the proposals annexed.

☞ It is agreed that this policy shall expire at twelve o'clock at noon on the 29th day of March, in the year one thousand eight hundred and seventy-four, unless continued by endorsement or acknowledgment as aforesaid, and then at the time shall expire according to the tenor of the said endorsement or acknowledgment.

This policy shall not be valid until countersigned by the authorized agent of the said Franklin Fire-Insurance Company of Philadelphia, in Little Rock, Arkansas.

In witness whereof the Franklin Fire-Insurance Company have caused these presents to be signed by their president and attested by their secretary in the city of Philadelphia, Pennsylvania.

ALFRED G. BAKER,
President.

THEOD. M. REGER,
Secretary.

Countersigned at Little Rock this 29th day of March, 1873.
FAGAN & TREZEVANT, *Agents.*

For insuring of houses, manufactories, and other buildings, stores, ships in harbor and upon the stocks, and of goods, wares, and merchandise, agricultural products, and rents, from loss or damage by fire.

Conditions of insurance.

I. Persons desirous of making insurances are to furnish the company with the following information: The construction, material occupancy, and location of the buildings, as well as of those contiguous, and a description of the articles to be insured.

If the assured shall cause the buildings, goods, or other property to

be described in this policy otherwise than as they really are, so that they be charged at a lower premium than is herein proposed, this policy shall be of no force; or if the risk shall be increased, by any means whatever within the control of the assured, during the continuance of the insurance, and notice thereof be not given to the company, and such increased risk be allowed and endorsed thereon, this policy shall be of no force; or if during the insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise; or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured, or his representative, of their intention to do so, in which case the company will refund a ratable proportion of the premium.

All renewals shall be considered as made under the original representation, unless varied by new representations, which in all
12 cases shall be reported by the assured and endorsed on this policy by the company.

Each building must be separately insured, and in like manner a separate sum insured on the property contained in each.

. II. Property held in trust or on commission must be insured as such; otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interest therein.

Goods on storage must be separately and specifically insured.

If the interest in property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, or otherwise the insurance shall be void.

NOTE.—By "property held in trust" is intended property held under a deed of trust or will, or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

III. No assignment of this policy shall be valid unless endorsed
13 hereon and approved by the company within thirty days from the date of the transfer of the property. The company reserves the right to approve the transfer or not, returning a ratable proportion of the premium on cancelling the policy. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall cease after thirty days.

IV. No loss or damage to be paid in case of fire happening by any invasion, foreign enemy, civil commotion, riot, or any military or usurped power whatever, nor by theft at or after a fire. If the property shall be removed from a building when there is no loss by fire, the damage shall be borne by both parties in such proportions as the whole sum insured bears to the whole value of the property insured.

V. Books of accounts, written securities, evidences of debt, title to property, ready money, and profits cannot be insured.

VI. Jewels, jewelry, plate, clocks, watches, medals or other curiosities, paintings, engravings, sculpture, statuary, and musical instruments, (piano-fortes in dwelling-houses excepted) and plate-glass
14 over three square feet, wall-paper and bordering over fifty cents per peice, decorative painting, stucco work, and fancy flooring, over the cost of plain painting, plastering, and flooring, are not included in this policy unless specified.

VII. All persons having property insured in this company must, with reasonable diligence, give notice of all additional insurances made in their behalf on the same, whether by this company or by other insurers, and of all changes that may be made in such additional insurances, and cause such notice to be endorsed on their policies; and each company shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained; & unless such notice is given, the insured will not be entitled to recover in case of loss.

VIII. No order of insurance will be of any force, nor shall this policy be binding upon the company until the premium be paid.

IX. Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands.

15 And they shall, when required in writing, accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurance has been made on the same property; giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe. They shall also produce, when required in writing, a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes the he,

16 she, or they have by misfortune, and without fraud or evil practice, sustained loss or damage on the subject insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify.

When merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case shall admit, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged goods, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The amount of damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon; and whenever required in writing, the insured or person claiming shall produce and exhibit his books of account and other vouchers to the insurers or their agent, at the office of this company, in support of his claim, and permit extracts and copies thereof to be made; and shall also exhibit to any persons named by the company, and shall permit to be

17 examined by them, any property damaged, on which any loss is claimed, or any property saved which was insured by this policy. And until such proofs, declarations, and certificates are produced, and such appraisals and examinations of property permitted by the claimant, as required, the loss shall not be payable.

All fraud or false swearing shall cause a forfeiture of all claims on the insurers, & shall be a full bar to all remedies against the insurer on this policy.

X. In case of the loss on or damage to the property insured, it shall

be optional with the company to replace the articles lost or damaged with others of the same kind and quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss required by the ninth article of these conditions, and the assured shall, if required by this company, furnish full plans and specifications of the building or buildings destroyed, with detailed estimates of the cost of the same. In case differences
18 shall arise concerning the amount of any loss or damage by fire, the matter shall, at the written request of either party, be submitted to the judgment of arbitrators indifferently chosen, whose award in writing as to the amount of such loss and damage shall be binding on the parties.

XI. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, without any deduction whatever.

XII. The insurance by this policy shall cease at and from the time that the property hereby insured shall be levied on or taken into possession or custody, under any proceeding in law or equity; and in case of sale of the property insured or cessation of the risk otherwise than by fire, a return premium will be made, if applied for within thirty days thereafter, less five per cent.; the company retaining the short period rate of premium for the expired time; provided, however, that no premium shall be returned for a less period than one month.

XIII. No suit or action of any kind against this company for the recovery of a claim under this policy shall be sustainable in any court of law or chancery, unless commenced within the term of one year
19 from the date of the fire; but such lapse of time shall be deemed conclusive evidence against the validity of said claim.

This policy will not cover unoccupied buildings unless insured as such; and if the premises insured shall be vacated, and so remain for ten days without notice to this company, this policy shall cease and determine.

XIV. This company is not liable for damage by lightning or explosions of any kind, except from fire consequent thereon; nor where fire heat is used in any process to the articles damaged by such process; nor to goods in show-windows when the fire originates from the lights in said windows; nor when camphene, pine-oil, burning fluid, or any similar inflammable liquid is used for light or kept for sale by the assured without permission noted on the policy.

XV. All insurances of rents by this policy shall be understood and agreed to be upon the terms, conditions, and limitations following: The company shall indemnify the insured from any loss of rent he may sustain by a fire happening within the period limited to the building specified, whereby it shall have become untenantable, and that although part of the loss of rent be after the period of insurance shall have expired.
20 The loss shall be computed from the date of the fire; shall cover the actual loss of rent by reason of the premises or part thereof having been rendered untenantable by fire, at the rate of rent per annum expressed in the policy by the sum insured thereon, and for a time not to exceed the period of twelve months, nor the time when the building shall be made tenantable. It is also understood and agreed that the insured shall proceed without delay and with despatch to repair or rebuild the damaged or burnt building; and the said company shall be subrogated to the remedy which the insured may have against any tenant liable for rent during the period of repairs or restoration for their re-imbursement.

(Indorsed:) No. 495415. Expires May 29th, 1873. Franklin Fire-Insurance Company of Philadelphia, Nos. 435 & 437 Chestnut st. On merchandise. James L. Vaughan. Dolls., twenty-five hundred; premium $15.00.

21 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 27 day of October, anno Domini one thousand eight hundred and seventy-three, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had on Decembar 2d, A. D. 1874.

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY OF Philadelphia.

Comes the defendant, by Rose and Green, esqs., her attorneys, and files herein her demurrer to plaintiffs complaint, which demurrer is in the words and figures following, to wit:

And the said defendant comes and says that the said complaint is not sufficient in law, and for cause of demurrer he says that the said plaintiff hath not set out in his complaint the said "application and diagram No. 403, People's Insurance Co., which is his war-
22 ranty," and made part of said policy by the terms thereof.

Whereupon said defendant prays that said complaint may be quashed, &c.

ROSE & GREEN
For Deft.

Filed Dec. 2, 1873.

RALPH L. GOODRICH, *Clerk.*

And on December 12th, A. D. 1873, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes the defendant, by Rose and Green, esqs., her attorneys, and the demurrer heretofore filed herein is heard, argued, and submitted to the court, and, the court being well advised in the premises, considers that said demurrer be overruled; and the said defendant, by her attorneys, files herein her answer, which answer is in the words and figures following, to wit:

23 The said defendant, for answer, says that she admits that she is a corporation duly created and organized under the laws of the State of Pennsylvania, doing business through her agents in Arkansas.

2. Defendant admits the issuance of a policy of insurance to said de-
A. fendant, the same being Exhibit A referred to in said complaint.

3. Defendant says that it is not true, as stated in said complaint, that

at the time of effecting said insurance the said plaintiff had an interest in said property so insured exceeding the sum of six thousand dollars.

4. That the application and diagram referred to in policy of insurance as "No. 403, People's Ins. Co.," as the warranty of said plaintiff and a part of said policy was a written and printed application and warranty of said plaintiff upon the basis of which said policy was issued, a true copy of which is hereto annexed, marked "Exhibit A," and made part hereof.

5. That in the said application, in response to the following question: "Property to be insured; if insurance is wanted on the
24 building, are you the sole owner in the fee simple of the premises? If not, state what your interest is. If on merchandize, what is your average stock, and do you keep a merchandize account? Is any other person interested with you in the same?" the said plaintiff made answer, as follows: "No other one interested," which was not true; one William B. Flowers having had at that time a lien on the property so insured for a large amount of money due him, which lien was valid and subsisting, and that the said Flowers was interested at that time with said plaintiff in said merchandize.

6. That in the said application, in answer to the question "incumbrances; if any, state the amount. Is there any insurance by the mortgagees? State the amount," the said plaintiff made answer, as follows: "None;" which answer was untrue; the said property insured in the said policy being at that time in the possession of said William B. Flowers, his agents or trustees, and held under an agreement with said plaintiff for a large sum of money due to said Flowers for the purchase of said property, the said plaintiff not having the right to the pos-
25 session of said property until said purchase-money should be paid, and that the said purchase-money had not been paid at the time that said insurance was effected.

7. That in the said application the said plaintiff represented said merchandize as being of the value of twelve thousand dollars, which representation was untrue; the said merchandize being at that time of no greater value than the sum of six thousand dollars.

8. That it was a rule of business of the said insurance company, for its own protection, never to insure merchandize for its full value, and in no case for more than three-fourths of its actual value; and that the said plaintiff, well knowing the custom of insurances companies in this regard, the same corresponding in all respects with the said rule of business of this defendant, designing and contriving to deceive the defendant as to the value of said merchandize, and thereby to obtain said insurance for the full value of the same, did, in his said application, fraudulently represent the said merchandize to be of the value of twelve thousand dollars, and did thereby deceive the said defendant, and did fraudulently obtain the said policy for twenty-five hundred dollars, and at the same time other policies from other insurance com-
26 panies represented by the same agent, amounting in the aggregate to the sum of six thousand dollars, which was the full value of said merchandize.

9. That at the time of the issuance of said policy, and at the time of the loss of said merchandize, the same was owned by the said plaintiff and said William B. Flowers in common, and that the said merchandize was not destroyed without the fault of said plaintiff or said Flowers.

10. That by the terms of said policy sued on herein certain conditions were thereto annexed and made part thereof, as will be seen by reference to the policy referred to in plaintiff's complaint, marked "Ex-

hibit A," and that among others of said conditions was the following: "If the interest in property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, or otherwise the insurance shall be void." And the said defendant says that the interest of said plaintiff in said merchandize at the time of affecting said insurance was not absolute, and that that fact was not expressed in said policy in writing.

27 11. That among the said conditions referred to in said policy annexed thereto and made part thereof was that above named, that is to say: "If the interest in property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, or otherwise the *issuance* shall be void." And the said defendant says that at the time that the said insurance was effected, the interest of said plaintiff in the merchandize insured was not absolute, and that that fact was not represented to said defendant at or prior to the time of issuing said policy.

ROSE & GREEN, *for Deft.*

UNITED STATES OF AMERICA,
Eastern District of Arkansas, ss:

I, J. T. Trezevant, jr., do solemnly swear that I am an agent of the defendant in the suit above named; that the principal officers of said defendant are absent from said district; and that I believe the statements made in the foregoing answer are true.

J. T. TREZEVANT, JR., *Agt.*

Sworn to and subscribed before me, a United States commissioner for said district, on this 17th day of September, 1873.

JOHN WASSELL,
U. S. Comr.

28 *Exhibit A to answer.*

PEOPLE'S INSURANCE COMPANY OF ARKANSAS.

, agent at

The estimated cash value of personal property, and of each building to be insured, and the sum to be insured on each, must be stated separately. When personal property is situated in two or more buildings, the value and amount to be insured in each must also be separately stated; and the same description should be given of the building containing the property as when insurance is wanted on the building itself. Three fourths only of the actual value to be insured.

Application of James L. Vaughan, of South Rock, Arks., in the county of Pulaski, and State of Arks., for insurance against loss or damage by fire, by the People's Insurance Company, in the sum of six thousand dollars, on the property specified, the value of the property being estimated by the applicant.

	Valuation.	Sum to be insured.	Rate.
On stock of dry goods, hats, caps,	$12,000	$6,000	$\frac{3}{10}$ of 2 %
On boots, shoes, notions, and other	$	$	$
On merchandize not more hazardous	$	$	$
On	$	$	$

Being situated as follows: In 2-story tin-roofed brick building, situated No. 110 Main street, bet. 2nd & 3d streets, Little Rock, Arks., from the 29 Mch., 1873, to the 29 May, 1873.

1. BUILDING.—When built? Is it stone, brick, or wood? What size? How many stories high? Roof covered with what? Are the gutters stone, metal or wood? Is there a good lightning-rod properly put up? Is there a cellar under the house, and is it walled up with stone or brick?	1. 1871; brick; 2 stories; tin-roof; no cellar.
2. WALLS.—If building be of brick or stone, are the side or party walls entire, and do they rise above the roof?	2. Brick.
If walls are entire, how many openings are there, and where situated?	
3. CHIMNEYS, ETC.—Are they of brick and built from the ground? If not, on which floor do they rest?	3. Brick flues.
Are they all sound?	Yes.
Are there any wooden fire-boards, which may ignite from fallen cinders in the fire-places?	No.
4. STOVES AND PIPES.—Are they safely put up, and provided with the usual preventives against accidents by fire? And will you engage to keep them so?	4. Yes. Yes.
Any pipes passing through floors or partitions? If so, how secured?	No.
5. FUEL, LIGHTS, ETC.—What is used for fuel? What for lights?	5. Wood and coal; gas-lights.
Ashes, how disposed of? Will you agree that they shall not be kept in wooden vessels in the building, or near enough to endanger it?	
6. OCCUPANCY.—For what purpose is each story of the building occupied? How many tenants?	6. Mercantile purposes.
On which floor is the property to be insured?	Both floors.
7. EXPOSURES.—What is the distance, occupation, and materials of buildings within 100 feet? Answer fully.	7.
On the north?	N.
On the east?	E. See diagram
On the south?	S. book.
On the west?	W.
8. PROPERTY TO BE INSURED.—If insurance is wanted on the building, are you the sole owner, in the fee-simple, of the premises? If not, state what your interest is.	8.
If on merchandise, what is your average stock, and do you keep a merchandise account? Is any other person interested with you in the same? How often is account of stock taken? When was it last taken, and what amount did it reach?	No other one interested.
What other insurance, if any, is there upon the property, and at what office?	None.
Have you ever suffered loss of property by fire? If so, were you insured, and at what office.	No.
9. INCUMBRANCE.—If any, state the amount.	9. None.

Is there any insurance by the mortgages? State the amount.	
10. INCENDIARISM.—Have you reason to fear that your property is in danger from it.	10. No.
11. EXTINGUISHING FIRES.—What appliances and arrangements for extinguishing fires are there on the premises, or in the vicinity, or so as to be available?	11. City fire department.

And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant, and material to the risk.

Dated , 187 .

(Signed) JAMES L. VAUGHAN, *Applicant.*

Make a diagram of the premises on the other side of the sheet.

29 And on January 9th, A. D. 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes the defendant, by U. M. Rose, esq., her attorney, and both parties announcing themselves ready for trial, a jury came, to wit, George V. Weaver, John W. Moore, Adolphus A. Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorn, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Orsborne, and Thomas Ives, being twelve good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined herein and a true verdict give according to the law and the evidence; and thereupon the jury proceed to hear the evidence, on the part of the plaintiff, and the trial hereof not being concluded, the same is continued until to-morrow morning at ten o'clock.

And on January 10th, A. D. 1874, as follows:

30 JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes the defendant, by U. M. Rose, esq., her attorney, and come the jury, to wit, George V. Weaver, John W. Moore, Adolphus A. Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorne, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Osborne, and Thomas Ives, and the trial hereof not being concluded on yesterday, the same is now resumed; and the trial hereof not being concluded, the same is continued until Monday morning next at ten o'clock.

And on January 12th, A. D. 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes the defendant, by Rose and Green, esqs., her attorneys, and come the jury, to wit, George V. Weaver, John W. Moore, Adolphus A.
31 Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorne, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Osborne, and Thomas Ives, and the trial hereof not being concluded on Saturday, the same is now resumed; and the trial hereof not being concluded, the same is continued until to-morrow morning at ten o'clock.

And on January 13th, A. D., 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes the defendant, by Rose and Green, esqs., her attorneys, and come the jury, to wit, George V. Weaver, John W. Moore, Adolphus A. Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorne, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Osborne, and Thomas Ives, and the trial hereof not being concluded on yesterday, the same is now resumed; and the trial hereof not being concluded, the same is continued until to-morrow morn-
32 ing at ten o'clock.

And on January 14th, A. D. 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq, his attorney, and comes the defendant, by Rose and Green, esqs., her attorneys, and come the jury, to wit, George V. Weaver, John W. Moore, Adolphus A. Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorne, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Osborne, and Thomas Ives, and the trial hereof not being concluded on yesterday, the same is now resumed; and the jury having heard all the evidence adduced, as well on the part of the plaintiff as of the defendant, and the arguments of counsel, and being charged and instructed by the court, retired to consult of their verdict.

And on January 15th, A. D. 1874, as follows:

33 JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the plaintiff, by E. H. English, esq., his attorney, and comes

the defendant, by Rose and Green, esqs., her attorneys, and come the jury, to wit, George V. Weaver, John W. Moore, Adolphus A. Anderson, Simon B. Poe, Adolph Mintzer, Jacob M. Hirschhorne, Thomas J. Allison, John W. Hopkins, Cullen G. Cribbs, Reynold R. Carlisle, Marmaduke Osborne, and Thomas Ives, and return into court the following verdict: "We, the jury, find the issues for the plaintiff, and assess his damages at twenty-five hundred dollars."

It is therefore ordered, considered, and adjudged that said plaintiff, James L. Vaughan, do have and recover of and from said defendant, the Franklin Fire-Insurance Company, the sum of twenty-five hundred dollars, for his damages assessed as aforesaid, together with all his costs in and about this suit expended, and have execution therefor.

34 MEMORANDUM—And by agreement of parties, the jury returned also the value of the property destroyed by the fire, as follows: "We, the jury, find the amount of goods destroyed by fire to be seven thousand two hundred and four dollars." And during the course of said trial the said defendant excepted to sundry rulings of the court, and to save said exceptions asked and obtained leave to file his bill of exceptions herein at any time during the present term of the court.

And on February 16th, A. D. 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE COMPANY.

Comes the defendant, by Rose and Green, esqs., her attorneys, and files herein her bill of exceptions; which bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause the plaintiff, to sustain the issue on his part, introduced the policy of insurance
35 sued upon in evidence, in words and figures following. (For policy see Exhibit A to complaint.)

The plaintiff also proved the loss of the insured merchandize by fire on the 5th day of May, 1873, and the value of the same, and that the fire did not occur through any cause excepted by the said policy, such as by riot, usurped powers, &c.

The plaintiff then rested.

The defendant, to sustain the issue on her part, thereupon introduced in evidence the application on which said policy was granted; which is in words and figures following, to wit, (for application see Exhibit A to answer,) and also proof of loss; which is in the words and figures following, to wit:

STATE OF ARKANSAS,
Pulaski County:

Statement of James L. Vaughan, under oath, to form and be taken as part of his proof of loss under Franklin Fire-Insurance Company's policy No. 495415, People's Insurance Company of Arkansas, policy No. 403, and Mississippi Valley Insurance Company, No. 119; which statement shall not be a waiver of any further examination or
36 sworn statement that any of said companies may demand hereafter, nor is it to be a waiver of regular proof, as required by said policies;

Who, being first duly sworn, deposes and says that he bought from

William B. Flowers, of Lonoke, Arkansas, a stock of goods amounting to the sum of $12,792.13, as per the original invoices now before me. I paid him no cash for the stock of goods, gave him a dwelling-house and lot in Little Rock, valued at $2,200.00, and lots in Memphis, Tennessee, valued at $850.00, making total $3,050.00, and, in addition, acknowledge a balance due him of $3,100.00. No note was given, but due on an open account, which makes the total cost of the goods to me from Flowers of $6,150.00; and in addition to this I traded a lot to Wm. Sillerlery, which I valued at $450, lying in Little Rock, adjoining the house that I sold to Wm. B. Flowers, and received for the same a lot of goods, which I selected from his stock, and by invoice amounted to the sum of $500.00. These stock' of goods constituted my entire stock of goods on the 29th day of March, 1873, the day on which the insurance was taken and also the day the trade was completed.

When I purchased the goods, I did not compare the invoice handed me by W. B. Flowers with the goods. I do not know whether
37 the goods mentioned in the invoices were actually in the store or not. I suppose they were there.

All the goods I bought remained with Harris & Co. in the auction-store from the day of the purchase by me until the day of the fire. I made an obligation with Harris & Co. to let the goods remain with them, and all the sales were to be paid over to Flowers on account of balance due him of $3,100. I had no disposition to remove the goods from Harris & Co., but I could not have done so without their consent on the payment of Flowers' debt. All the sales I made were paid over to Harris & Co. every night on account of W. B. Flowers. I have examined a copy of said obligation now shown me, and hereto attached, marked "Exhibit A," which is a correct copy of said obligation as far as I know or believe. All that I have got out of said stock of goods is about one hundred dollars in goods, but no cash.

I have examined the application made by me to the Franklin Insurance Company. My signature is genuine to the same. I signed my name thereto at the time insurance was effected. The question in said application was asked me. I remember the clerk asking me if said stock of goods were mortgaged; told him no. All the answers to said
38 application was made by me, and I signed my name thereto. I hereby attach the said application to this answer, marked "Exhibit B."

The fire occurred on the 5th day of May, 1873, between 6 and 7 o'clock in the evening. I left the store-room, in the 2d story, over Harris & Co.'s auction-room, on Main street, Little Rock, Arkansas, about 15 minutes before 6 o'clock. Late in the evening, in the lower store, Col. Breeden spoke to me, and said, "Invite these ladies (two there in the store) to go up and buy some goods." I did so. They went up with me and my little son. After we got up into the upper room, where my goods were, I asked them what they would look at. They replied they had no money to buy goods; a few moments they turned and walked down stairs. I went ahead. They followed me down, and my son followed them down. I did not go back up stairs again that evening. At the time above referred to there was no other person or persons in the room but the two ladies and myself and son. I do not remember that C. Bowker was in the 2d story that evening. I left him in the lower story. I know he was not up there while the ladies were there, or afterwards before I left. There was no shelving in the 2d story. My goods were tiered up on boxes, counters, and tables, and some of them
39 on the floor. I was at the store almost every day from the 29th

March, 1873, to the day of fire, 5 May, '73. The sales amounted to almost $650 cash—so reported to me—none of which I got, as I said before; only $100 received by me in goods. The title to my house and lot and the lots in Memphis were perfect. The lot in Little Rock I bought from B. Trapnall and Bro. about one year ago, and since then built a house on it myself. The lot and house cost about $1,500. The lots in Memphis were the property of my first wife, who is dead, leaving only one child, which is dead also, leaving me the only heir. I do not know whether the taxes have been regularly *made*. Mess. Tregevant and Royster are my agents. I have not paid any taxes for a year or two back. The lots are vacant, and yield no rent. I am still in possession of the house and lot I sold to Flowers, in Little Rock. By the terms of our trade I am to keep possession of it till 1st November next, free of rent. Some of the goods are what persons call hard stock, old shop-worn goods; but some were very nice goods. I don't know the cash value of the stock of goods. I was induced by Flowers to believe I could realize at least ten thousand dollars for them. The deeds were regularly made by me and my wife and delivered to Wm. B. Flowers.

JAMES L. VAUGHAN.

40 STATE OF ARKANSAS,
County of Pulaski:

This day personally appeared before me, C. S. Collins, a notary public in and for said county, James L. Vaughan, who, after being first duly sworn, deposes and says the matters and things stated in the above attached pages are true to the best of his information and belief. Such matters as are therein stated of his own knowledge he knows to be true, and others stated on information he believes to be true.

JAMES L. VAUGHAN.

Sworn to and subscribed before me this 26th May, 1873.

C. S. COLLINS,
N. P. for Pulaski County, Arks.

Exhibit A.] EXHIBIT A.

William B. Flowers having this day sold to James L. Vaughan a stock of goods amounting in value to $6,200.00, for which said Vaughan has paid thereon in real estate situated in Memphis, Tennessee, and Little Rock, Arkansas, and particularly described in the deeds from said Vaughan and wife to said Flowers, bearing date March 29th, 1873, valued at $3,050.00, and for the balance due on said stock of goods, amount-
41 ing to $3,150.00, which goods are now in the possession of W. R. Harris & Co., auctioneers, residing in the city of Little Rock, who are hereby authorized to sell said goods, and out of the first money realized from said sales are to pay over to said Flowers the same, and are also hereby authorized to advance money upon said stock of goods on thirty and sixty days' time until said sum of $3,150 is fully paid; and the said Harris & Co. are to retain full possession and control of said stock of goods as security for any amounts they may advance thereon.

Given under my hand this 2d day of April, 1873.

JAMES L. VAUGHAN.

In presence of witnesses—
L. O. BREEDEN.
WM. SILBERBERG.

(Indorsed:) Received fifty dollars on the within account.
W. B. FLOWERS.

We certify the foregoing is a true copy of the original now in our possession.
May 26th, 1873.
HARRIS & BREEDEN.

The sales of the above stock made by us up to the day of the fire, 5th May, 1873, amounted to $653.06.
May 26, 1873.
HARRIS & BREEDEN.

42 Exhibit B hereto is the same as Exhibit A to answer.

There was evidence introduced also tending to prove the following facts:

That the plaintiff bought the merchandize insured on the same day that the application for insurance was made, but before the application was made of one Flowers. That the goods at the time of said purchase were in an auction-house in Little Rock, kept by Harris and Breeden, for sale. That the plaintiff at the time of making said purchase paid a part of the purchase-money, amounting to three thousand and fifty dollars in real estate, which he conveyed to Flowers, and that there remained a balance of said purchase-money due Flowers, amounting to thirty-one hundred and fifty dollars; that Flowers took no note or other writing from the plaintiff for said balance. That the plaintiff had the possession of the goods insured, and the right to sell and direct and control the sale of the same, with this limitation, viz, that the goods were not to be removed from the house of Harris and Breeden until the balance of the purchase-money was paid, and the first proceeds of the sales of the goods were to be applied to the payment of the
43 unpaid purchase-money. There was also evidence tending to show that the agreement copied in instructions of the court which was introduced in evidence by the defendant was substantially the same agreement that was made orally between the plaintiff and Flowers at the time of the purchase of the goods insured, except as to the clause relating to advances to be made by Harris and Breeden to Flowers. That the remainder of the debt to Flowers had not been paid, and that immediately after the fire, Flowers sued the plaintiff for the balance of the purchase-money, and garnisheed the defendant, and that that suit is still pending. There was also evidence tending to show that it is a custom of all insurance companies and of the defendant company not to insure merchandize for more than two-thirds or three-fourths of its value, and not more than one-half in value of a hard or auction stock of goods, though it was not shown the plaintiff knew of any such custom at the time of applying for the policy.

The defendant thereupon asked the court to give to the jury the following instructions:

44 1. If the jury find from the evidence that the application of the plaintiff for the policy sued on contained the following question—"If the insurance is wanted on the building are you the sole owner in the fee-simple of the premises? If not, state what your interest is. If on merchandize, what is your average stock, and do you keep a merchandize account; is any other person interested with you in the same?" And that the said plaintiff made answer thereto, as follows: "No other one inter-

March, 1873, to the day of fire, 5 May, '73. The sales amounted to almost $650 cash—so reported to me—none of which I got, as I said before; only $100 received by me in goods. The title to my house and lot and the lots in Memphis were perfect. The lot in Little Rock I bought from B. Trapnall and Bro. about one year ago, and since then built a house on it myself. The lot and house cost about $1,500. The lots in Memphis were the property of my first wife, who is dead, leaving only one child, which is dead also, leaving me the only heir. I do not know whether the taxes have been regularly *made*. Mess. Tregevant and Royster are my agents. I have not paid any taxes for a year or two back. The lots are vacant, and yield no rent. I am still in possession of the house and lot I sold to Flowers, in Little Rock. By the terms of our trade I am to keep possession of it till 1st November next, free of rent. Some of the goods are what persons call hard stock, old shop-worn goods; but some were very nice goods. I don't know the cash value of the stock of goods. I was induced by Flowers to believe I could realize at least ten thousand dollars for them. The deeds were regularly made by me and my wife and delivered to Wm. B. Flowers.

JAMES L. VAUGHAN.

40 STATE OF ARKANSAS,
County of Pulaski:

This day personally appeared before me, C. S. Collins, a notary public in and for said county, James L. Vaughan, who, after being first duly sworn, deposes and says the matters and things stated in the above attached pages are true to the best of his information and belief. Such matters as are therein stated of his own knowledge he knows to be true, and others stated on information he believes to be true.

JAMES L. VAUGHAN.

Sworn to and subscribed before me this 26th May, 1873.

C. S. COLLINS,
N. P. for Pulaski County, Arks.

Exhibit A.] EXHIBIT A.

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41 ing to $3,150.00, which goods are now in the possession of W. R. Harris & Co., auctioneers, residing in the city of Little Rock, who are hereby authorized to sell said goods, and out of the first money realized from said sales are to pay over to said Flowers the same, and are also hereby authorized to advance money upon said stock of goods on thirty and sixty days' time until said sum of $3,150 is fully paid; and the said Harris & Co. are to retain full possession and control of said stock of goods as security for any amounts they may advance thereon.

Given under my hand this 2d day of April, 1873.

JAMES L. VAUGHAN.

In presence of witnesses—
L. O. BREEDEN.
WM. SILBERBERG.

(Indorsed:) Received fifty dollars on the within account.
W. B. FLOWERS.

We certify the foregoing is a true copy of the original now in our possession.
May 26th, 1873.
HARRIS & BREEDEN.

The sales of the above stock made by us up to the day of the fire, 5th May, 1873, amounted to $653.06.
May 26, 1873.
HARRIS & BREEDEN.

42 Exhibit B hereto is the same as Exhibit A to answer.

There was evidence introduced also tending to prove the following facts:

That the plaintiff bought the merchandize insured on the same day that the application for insurance was made, but before the application was made of one Flowers. That the goods at the time of said purchase were in an auction-house in Little Rock, kept by Harris and Breeden, for sale. That the plaintiff at the time of making said purchase paid a part of the purchase-money, amounting to three thousand and fifty dollars in real estate, which he conveyed to Flowers, and that there remained a balance of said purchase-money due Flowers, amounting to thirty-one hundred and fifty dollars; that Flowers took no note or other writing from the plaintiff for said balance. That the plaintiff had the possession of the goods insured, and the right to sell and direct and control the sale of the same, with this limitation, viz, that the goods were not to be removed from the house of Harris and Breeden until the balance of the purchase-money was paid, and the first proceeds of the sales of the goods were to be applied to the payment of the
43 unpaid purchase-money. There was also evidence tending to show that the agreement copied in instructions of the court which was introduced in evidence by the defendant was substantially the same agreement that was made orally between the plaintiff and Flowers at the time of the purchase of the goods insured, except as to the clause relating to advances to be made by Harris and Breeden to Flowers. That the remainder of the debt to Flowers had not been paid, and that immediately after the fire, Flowers sued the plaintiff for the balance of the purchase-money, and garnisheed the defendant, and that that suit is still pending. There was also evidence tending to show that it is a custom of all insurance companies and of the defendant company not to insure merchandize for more than two-thirds or three-fourths of its value, and not more than one-half in value of a hard or auction stock of goods, though it was not shown the plaintiff knew of any such custom at the time of applying for the policy.

The defendant thereupon asked the court to give to the jury the following instructions:

44 1. If the jury find from the evidence that the application of the plaintiff for the policy sued on contained the following question—"If the insurance is wanted on the building are you the sole owner in the fee-simple of the premises? If not, state what your interest is. If on merchandize, what is your average stock, and do you keep a merchandize account; is any other person interested with you in the same?" And that the said plaintiff made answer thereto, as follows: "No other one inter-

ested." And that at that time the plaintiff held the merchandize insured under a purchase from one Flowers; that there was a balance due Flowers from Vaughan on the purchase-money, and that by agreement between them the merchandize was to be left in the hands of a firm of auctioneers, who were to make sales of the same, and that with the first proceeds of such sales the said auctioneers were to pay off the remainder of said purchase-money—then the jury will find for the defendant.

Refused.

2. If the jury find from the evidence that in the written application of the plaintiff for the policy sued on the following question was propounded to the plaintiff: "Incumbrances, if any, state the amount,"
45 and the said plaintiff answered, "None;" and that at that time said plaintiff held the merchandize insured under a contract of purchase from one Flowers, by which the merchandize was to remain in the hands of a firm of auctioneers, who were to make sales of the same, and who were with the proceeds of said sales to pay the remainder of the purchase-money due to said Flowers, then they will find for the defendant.

Refused.

3. That if the jury find from the evidence that it is a custom of insurance companies generally, and of the Franklin Fire Insurance Company not to insure merchandize for more than three-fourths of its value, and that the plaintiff in his said application knowingly overestimated the value of the property insured, and thereby procured insurance for the full value of said property, then this was in law a fraud on the insurance company, and the jury should find for the defendant.

4. If the jury find that the plaintiff in his said application greatly overestimated the value of the property insured, this is prima facie evidence of such fraud as will in law avoid the policy, which can
46 only be overcome by evidence that the plaintiff honestly believed the said property to be of the value stated in his application. That the true valuation in such case is the price which the property would bring in the market at a fair open sale for money, and not a merely speculative price.

Refused.

5. That if the jury find that said Flowers at the time said insurance was made had a lien on the property insured, and that the insurance was made purely for his benefit, then, in order to recover in this case, the plaintiff must show that the said property was destroyed without the wilful fault of either said plaintiff or said Flowers.

Refused; no evidence to make it pertinent or applicable.

6. That if the jury find that the said insured property was destroyed wilfully by said Vaughan they will find for the defendant.

Waived by defendant.

7. If the jury find that at the time of applying for and obtaining said policy the goods insured were held by a firm of auctioneers under an agreement made with Flowers by the plaintiff, by which said auctioneers were to hold the said goods and to make sales thereof, and
47 pay over the same to Flowers in payment of a part of the purchase-money still due thereon, and that the plaintiff did not have the right to remove said goods until said debt was paid, then the jury will find for the defendant.

Refused.

8. If the jury find that in making the application for insurance the plaintiff, or any other person for him, grossly misrepresented the value of the goods to be insured, estimating them at an extravagant value,

and thereby procured insurance for more than he could otherwise have obtained, then whether the said excessive valuation was intentional or not it avoids the policy, and the jury should find for the defendant.

Refused.

And the court refused to give either or any of said instructions. To which ruling the defendant at the time excepted.

And thereupon the court, on its own motion, gave the following charge to the jury:

Charge.

This suit is brought to recover the amount of a policy of insurance against fire, issued to the plaintiff by the defendant on a stock of goods.

That the goods insured were burned after the date of the
48 policy and before its expiration is not disputed.

But the defendant insists that it is not liable on the policy, and in its answer sets up and relies on the following, among other matters of defence. (The court here read to the jury the 4, 5, 6, 10, and 11 paragraphs of defendant's answer.)

In reference to the defence set up in the foregoing paragraphs of the answer, and in view of the evidence bearing thereon, I say to you that if you find from the evidence the plaintiff purchased the goods in question from Flowers and that at the time of such purchase the goods were in the auction and commission house of Harris and Breeden, and that at the time of the purchase the goods were turned over to the custody and control of the plaintiff, but with an understanding or agreement that the plaintiff should not remove the goods from the auction and commission house of Harris and Breeden until the balance of the purchase-money due Flowers for the goods had been paid, and that the first proceeds of the sales of the goods were to be paid to and retained by Harris and Breeden and by them paid over to Flowers, then I say to you that the defences
49 set up and relied on in the paragraphs of the defendant's answer above quoted are not made out.

Some three or four days after the application was made and the questions answered upon which the policy was issued, the plaintiff signed a written paper, in evidence before you, in these words. (See Exhibit A, ante page 40.)

It is conceded this paper was not in existence at the date of the application and when the questions accompanying the application were answered and the policy issued.

In reference to this paper I say to you that it constitutes no defence to this action.

The defendant's counsel concede that this paper correctly expresses the agreement or arrangement between the plaintiff and Flowers in reference to the means and manner of payment of the balance of the purchase-money, except that clause relating to advances that might be made by Harris & Co., the auctioneers, which is not material to the case.

Now, if you find from the evidence that this paper does express correctly the verbal agreement between plaintiff and Flowers in rela-
50 tion to the payment of the balance of the purchase-money, and that such understanding or agreement existed at the time the plaintiff made his application for insurance, I instruct you that the existence of such verbal agreement at the date of the application and issuance of the policy does not support the paragraphs of the defendant's answer, which I have read, and does not avoid the policy, and constitutes no defence in this action.

The eighth paragraph of the defendant's answer is as follows. (Here the court read the 8th paragraph of deft.'s answer.)

In reference to the defence set up in this paragraph of the answer, I say to you that if you find the averments of this paragraph of the answer are supported by the evidence you will find for the defendant.

The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer. And a knowing and wilful overvaluation of property by the insured with a view and purpose of obtaining insurance thereon for a greater sum that could otherwise be obtained is a fraud upon the insurance company that avoids the policy.

51 But a valuation made by the insured honestly and in good faith, and with no purpose or intention to mislead or defraud the insurance company, though excessive and much beyond the actual cash value of the property will not avoid the policy or defeat a recovery thereon in case of loss.

It is a question of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith and not intended to mislead or defraud the insurance company, then such overvaluation is not a fraudulent overvaluation that will defeat a recovery on the policy. An overvaluation of the goods by the insured is not in itself sufficient proof of a fraudulent valuation on the part of the assured, but it is a circumstance to be taken into consideration with the other evidence and circumstances in the case in the determination of the question of good faith on the part of the assured.

52 And if the valuation was grossly, enormously, in excess of the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error.

The value of the goods in the determination of this issue is the fair market value in the usual and ordinary course of business in the place and at the time they were insured.

If you find the issues for the plaintiff, and that the value of the goods burned exceed or equalled the amount of the policy sued on, your verdict should be for the amount of the policy. There were other policies issued by the same agent to the plaintiff on the goods destroyed, and by agreement of the parties; if your verdict in this case should be for the plaintiff, you are to find specially by your verdict the value of the goods destroyed by fire at the date of the loss, as a guide in settling the rights and liabilities of the insurance companies between themselves as well as with the plaintiff.

53 And the defendant at the time excepted to the said charge throughout, save to those parts of the same which are thus denoted: That part thereof included in the words beginning, "the eighth paragraph of the defendant's answer is as follows," and ending with the following words, "is a fraud upon the insurance company that avoids the policy."

That part thereof included in the words beginning, "And if the valuation was grossly and enormously in excess," and ending with the words, "in the place and at the time they were insured."

And to save the said several exceptions the said defendant at the time asked leave to prepare and present his bill of exceptions herein any day

during the present term of this court, which was then granted; and now, on this 16th day of January, 1874, and during the same term aforesaid, the said defendant presents here this her bill of exceptions, which, being examined and found correct, is signed and sealed, and ordered to be filed as a part of the record herein.

HENRY C. CALDWELL, [SEAL.]
U. S. District Judge.

And on March 13th, A. D. 1874, as follows:

JAMES L. VAUGHAN
v.
FRANKLIN FIRE-INSURANCE CO.

54 Comes the Franklin Fire-Insurance Company, by Rose and Green, esqs., her attorneys, and files herein her supersedeas bond which is approved and also her citation and writ of error; which are allowed by the court; which supersedeas bond is in the words and figures following, to wit:

Know all men by these presents that we, J. T. Trezevant, jr., and George W. Baxter are held and firmly bound unto James L. Vaughan in the full sum of five thousand dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 13th day of March, 1874.

Whereas lately at a term of the United States circuit court for the eastern district of Arkansas in a suit pending in said court wherein said Vaughan, as plaintiff, and the Franklin Fire-Insurance Company of Philadelphia, defendant, judgment was rendered against said
55 Franklin Fire-Insurance Company, and the said insurance company having obtained a writ of error, and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Vaughan, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next: Now the condition of the above obligation is such, that if the said Franklin Fire-Inusurance Company of Philadelphia shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation shall be null and void; else to remain in full force.

J. T. TREZEVANT, JR. [SEAL.]
GEO. W. BAXTER. [SEAL.]

UNITED STATES OF AMERICA,
Eastern District of Arkansas, ss:

On this day came before me, a United States commissioner for the eastern district of Arkansas, J. T. Trezevant, jr., and George W. Baxter, who, being by me duly sworn, made oath that, after payment of
56 their just debts and setting aside property exempt from execution, they are each worth the sum of twenty-five hundred dollars.

J. T. TREZEVANT, JR.
GEO. W. BAXTER.

Subscribed and sworn to before me this 13th day of March, 1874.

RALPH L. GOODRICH,
U. S. Comr.

Approved by order of the court.

RALPH L. GOODRICH, *Clerk.*

Which citation is in the words and figures following, to wit:

By the honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit.

To JAMES L. VAUGHAN:

Whereas there lately issued out of the Supreme Court of the United States a writ of error directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that in
57 the records and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between James L. Vaughan, plaintiff, and the Franklin Fire-Insurance Company of Philadelphia, a manifest error hath happened to the great damage of the said Franklin Fire-Insurance Company of Philadelphia;

And whereas for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, at the city of Washington, on the second Monday of October next; you are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the said second Monday of October next, to do and receive what may appertain, to justice to be done in the premises.

Given under my hand at the city of Little Rock, in the eastern district of Arkansas in the 8th circuit, the 13th day of March, in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the United States the 98th.

HENRY C. CALDWELL,
U. S. Dist. Judge.

58 (Endorsed:) I hereby acknowledge service of the within citation this 13th day of March, 1874.

E. H. ENGLISH,
Attorney for Defendant in Error.

59 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit, hereby certify, that the foregoing writings annexed to this certificate are true, correct, and compared copies of their originals on file and remaining of record in my office, and constitute a complete transcript of the papers and record in the above entitled cause.

In witness whereof I have hereunto set my hand and the seal of said court, this 29 day of June, in the year of our Lord, one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

[SEAL.] Attest: RALPH L. GOODRICH, *Clerk.*

(Indorsement on cover:) No. 222. The Franklin Fire-Insurance Company of Philadelphia, plaintiff in error, vs. James L. Vaughan. E. Arkansas C. C. U. S. Filed 13th August, 1874.

In the Supreme Court

Of the United States.

FRANKLIN FIRE INSURANCE COMPANY, OF PHILADELPHIA, Plaintiff,

versus

JAMES L. VAUGHAN, Defendant.

Error to United States Circuit Court, Eastern District Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

Vaughan sued the Insurance Company on a policy of insurance on a stock of merchandise. Several pleas were pleaded, of which it is only necessary in this court to examine the following:

"5. That in the said application (referring to the application for insurance, which had been before set out), in response to the following question: *Property to be insured*—If insurance is wanted on the building, are you sole owner in fee simple of the premises? If not, state what your interest is. If on merchandise, what is your average stock, and do you keep a merchandise account? *Is any other person interested with you in the same?* The said plaintiff made answer as follows: 'No other one interested,' which was not true, one William B. Flowers having had at that time a lien on the property insured, for a large amount of money due him, which lien was valid and subsisting; and that the said Flowers was interested at that time with said plaintiff in said merchandise.

"6. That in the said application, in answer to the question: '*Incumbrances*—If any, state the amount. Is there any insurance by the mortgagees? State the amount'—the said plaintiff made answer as follows: 'None,' which answer was untrue, the said property insured in said policy being at that time in the possession of said William B. Flowers, his agents or trustees, and held under an agreement with said plaintiff for a large sum of money due to said Flowers, for the purchase of said property until said purchase money should be paid; and that said purchase money had not been paid at the time that said insurance was effected.

"7. That in the said application said plaintiff represented said merchandise as being of the value of twelve thousand dollars, which representation was untrue, the said merchandise being at that time of no greater value than the sum of six thousand dollars.

"8. That it was a rule of business of the said insurance company, for its own protection, never to insure merchandise for its full value; and that the said plaintiff, well knowing the custom of insurance companies in this regard, the same corresponding in all respects with the said rule of business of this defendant, designing and contriving to deceive the defendant as to the value of said merchandise, and thereby to obtain said insurance for the full value of the same, did, in his said application, fraudulently represent the said merchandise to be of the value of twelve thousand dollars, and did thereby deceive the said defendant, and did fraudulently obtain the said policy for twenty-five hundred dollars, and at the same time other policies from other insurance companies represented by the same agent, amounting in the aggregate to the sum of six thousand dollars, which was the full value of said merchandise.

"10. That by the terms of said policy sued on herein, certain conditions were thereto annexed and made part thereof, as will be seen by reference to the policy referred to in plaintiff's complaint, marked 'Exhibit A;' and that among others of said conditions was the following: 'If the interest in property to be insured be a lease-hold interest, or other interest not absolute,

it must be so represented to the company, and expressed in the policy in writing, or otherwise the insurance shall be void.' And the said defendant says that the interest of said plaintiff in said merchandise, at the time of effecting said insurance, was not absolute, and that the fact was not expressed in said policy in writing.

"11. That among the said conditions referred to in said policy, annexed thereto and made part thereof, was that abovenamed; that is to say, 'If the interest in property to be insured be a lease-hold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, or otherwise the insurance shall be void.' And the said defendant says that at the time the said insurance was effected, the interest of the said plaintiff in the merchandise insured was not absolute, and that that fact was not represented to said defendant at or prior to the time of issuing said policy." (Tr., pp. 9, 10.)

The policy was made on an application of the insured, which was referred to in the policy as the "warranty" of the insured and as part of the policy (p. 3). Also, certain printed conditions were thereto annexed, and among others the following:

"II. Property held in trust or on commission must be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interest therein.

"Goods on storage must be separately and specifically insured.

"If the interest in property to be insured be a lease-hold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, or otherwise the insurance shall be void.

"NOTE.—By 'property held in trust' is intended property held under a deed of trust or will, or under the appointment of a court of law, or property held as collateral security, in which latter case this company shall be liable only to the extent of the interest of the assured in such property.

"All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on this policy."

In the application—which was thus made a warranty—to the question, "*Is any other person interested with you in the same?*" (the reference being to the merchandise insured) the insured answered, "*No other one interested.*" To the question, "*Incumbrance—If any, state the amount,*" he answered, "*None.*"

The application contained also the following clause: "And the said applicant hereby covenants and agrees to and with the said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant and material to the risk."

The property was valued by the insured at $12,000, and was insured at $6000 (Tr., pp. 8, 9).

In his proof of loss, the insured disclosed what he had concealed in his application. Being duly sworn, he said:

"That he bought from William B. Flowers, of Lonoke, Arkansas, a stock of goods amounting to the sum of $12,792.13, as per the original invoices now before me. I paid him no cash for the stock of goods; gave him a dwelling-house and lot in Little Rock, valued at $2200, and lots in Memphis, Tennessee, valued at $850, making total $3050, and in addition acknowledged a balance due him of $3100. No note was given, but ——— due on an open account, which makes the total cost of the goods to me from Flowers of $6150; and in addition to this, I traded a lot to Wm. Sillerberg, which I valued at $450, lying in Little Rock, adjoining the house that I sold to Wm. B. Flowers, and received for the same a lot of goods which I selected from his stock, and by invoice amounted to the sum of $500. These stocks of goods constituted my entire stock of goods on the 29th day of March, 1873, the day on which the insurance was taken, and also the day on which the trade was completed. When I purchased the goods, I did not compare the invoice handed me by W. B. Flowers with the goods. I

do not know whether the goods mentioned in the invoices were actually in the store or not. I suppose they were there.

"All the goods I bought remained with Harris & Co., in the auction store, from the day of the purchase by me until the day of the fire. I made an obligation with Harris & Co. to let the goods remain with them, and all the sales were to be paid over to Flowers, on account of balance due him of $3100. *I had no disposition to remove the goods from Harris & Co.'s, but I could not have done so without their consent on the payment of Flowers' debt. All the sales I made were paid over to Harris & Co. every night, om account of W. B. Flowers.* I have examined a copy of said obligation now shown me, and hereto attached, marked 'Exhibit A,' which is a correct copy of said obligation, so far as I know or believe. All that I have got out of said stock of goods is about one hundred dollars in goods, but no cash. I have examined the application made by me to the Franklin Insurance Company. My signature is genuine to the same. I signed my name thereto at the time insurance was effected. The question in said application was asked me. *I remember the clerk asking me if said stock of goods were mortgaged; told him no.* All the answers to said application were made by me, and I signed my name thereto. I hereby attach the said application to this answer, marked 'Exhibit B.'

* * * * * *

"Some of the goods are what persons call hard stock—old, shop-worn goods; but some were very nice goods. I don't know the cash value of the stock of goods. I was induced by Flowers to believe I could realize at least ten thousand dollars on them. The deeds were regularly made by me and my wife, and delivered to Wm. B. Flowers."

The policy of insurance was procured March 29, 1873. On the second day of April, 1873, Flowers and the insured reduced their agreement for the sale and purchase of the goods to writing. The agreement was as follows:

"William B. Flowers having this day sold to James L.

Vaughan a stock of goods, amounting in value to $6200, for which said Vaughan has paid thereon in real estate, situated in Memphis, Tennessee, and Little Rock, Arkansas, and particularly described in the deeds from said Vaughan and wife to said Flowers, bearing date March 29, 1873, valued at $3050, and for the balance due on said stock of goods, amounting to $3150, which goods are now in possession of W. R. Harris & Co., auctioneers, residing in the city of Little Rock, who are hereby authorized to sell said goods, and out of the first money realized from said sales are to pay over to said Flowers the same, *and are also hereby authorized to advance money upon said stock of goods on thirty and sixty days time until said sum of* $3150 *is fully paid;* AND THE SAID HARRIS & CO. ARE TO RETAIN FULL POSSESSION AND CONTROL OF SAID STOCK OF GOODS, AS SECURITY FOR ANY AMOUNTS THEY MAY ADVANCE THEREON.

"Given under my hand this second day of April, 1873.

"[Signed] J. L. VAUGHAN.

"In presence of witnesses: L. O BREEDEN,
WM. SILBERBERG."

There was evidence, as shown by the bill of exception, to prove that this writing was substantially the same as the oral agreement which it was intended to cover, with the exception of the clause as to future advances, which was a new feature, and which is printed above in Italics.

The bill of exception further shows:

"That the plaintiff bought the merchandise insured on the same day that the application for insurance was made, but before the application was made, of one Flowers. That the goods, at the time of said purchase, were in an auction-house at Little Rock, kept by Harris & Breeden, for sale. That the plaintiff, at the time of making said purchase, paid a part of the purchase money, amounting to $3050, in real estate, which he conveyed to Flowers, and that there remained a balance of said purchase money due Flowers, amounting to $3150; that Flowers took no note or other writing from the plaintiff for said balance. That the plaintiff had the possession of the goods

insured, and the right to sell and direct and control the sale of the same, with this limitation, viz: that the goods were not to be removed from the house of Harris & Breeden until the balance of the purchase money was paid; and the first proceeds of the sales of the goods were to be applied to the payment of the unpaid purchase money. There was also evidence tending to show that the agreement copied in instructions of the court, which was introduced in evidence by the defendant, was substantially the same agreement that was made orally between plaintiff and Flowers at the time of the purchase of the goods insured, except as to the clause relating to advances to be made by Harris & Breeden to Flowers."

The defendant on the trial asked the court to give to the jury the following instructions:

"1. If the jury find from the evidence that the application of the plaintiff for the policy sued on contained the following question: 'If the insurance is wanted on the building, are you the sole owner in the fee simple of the premises? If not, state what your interest is. If on merchandise, what is your average stock, and do you keep a merchandise account? Is any other person interested with you in the same"—and that the said plaintiff made answer thereto as follows: "No other one interested,' and at that time the plaintiff held the merchandise insured under a purchase from one Flowers; that there was a balance due Flowers from Vaughan on the purchase money, and that by agreement between them the merchandise was to be left in the hands of a firm of auctioneers, who were to make sales of the same, and that with the first proceeds of such sales the said auctioneers were to pay off the remainder of said purchase money, then the jury will find for the defendant.

"2. If the jury find from the evidence that in the written application of the plaintiff for the policy sued on, the following question was propounded to the plaintiff: 'Incumbrances—If any, state the amount,' and the said plaintiff answered, 'None;' and that at the time said plaintiff held the merchandise insured under a contract of purchase from one Flowers, by which the

merchandise was to remain in the hands of a firm of auctioneers, who were to make sales of the same, and who were, with the proceeds of said sales, to pay the remainder of the purchase money due to said Flowers, then they will find for the defendant.

"3. That if the jury find from the evidence that it is a custom of insurance companies generally, and of the Franklin Fire Insurance Company, not to insure merchandise for more than three-fourths of its value, and that the plaintiff in his said application knowingly overestimated the value of the property insured, and thereby procured insurance for the full value of said property, then this was, in law, a fraud on the insurance company, and the jury should find for the defendant.

"4. If the jury find that the plaintiff, in his said application, greatly overestimated the value of the property insured, this is prima facie evidence of such fraud as will in law avoid the policy, which can only be overcome by evidence that the plaintiff honestly believed the said property to be of the value stated in his application. That the true valuation in such case is the price which the property would bring in the market at fair, open sale, for money, and not a merely speculative price.

* * * * * *

"7. If the jury find that at the time of applying for and obtaining said policy, the goods insured were held by a firm of auctioneers, under an agreement made with Flowers by the plaintiff, by which said auctioneers were to hold the goods, and to make sales thereof and pay over the same to Flowers, in payment of a part of the purchase money still due thereon, and that the plaintiff did not have the right to remove said goods until said debt was paid, then the jury will find for the defendant.

"8. If the jury find that in making the application for insurance the plaintiff, or any other person for him, grossly misrepresented the value of the goods to be insured, estimating them at an extravagant value, and thereby procured insurance for more than he could otherwise have obtained, then whether the said excessive valuation was intentional or not, it avoids the policy, and the jury should find for the defendant."

And the court refused to give either or any of said instructions, to which ruling the defendant at the time excepted, and thereupon the court, on its own motion, gave the following charge to the jury:

"This suit is brought to recover the amount of a policy of insurance against fire, issued to the plaintiff by the defendant, on a stock of goods. That the goods insured were burned after the date of the policy, and before its expiration, is not disputed.

"But the defendant insists that it is not liable on the policy, and in its answer sets up and relies on the following, among other matters of defence: (The court here read to the jury the fourth, fifth, sixth, tenth and eleventh paragraphs of defendant's answer.) In reference to the defence set up in the foregoing paragraphs of the answer, and in view of the evidence bearing thereon, I say to you that if you find from the evidence the plaintiff purchased the goods in question from Flowers, and that at the time of such purchase the goods were in the auction and commission house of Harris & Breeden, and that at the time of the purchase the goods were turned over to the custody and control of the plaintiff, but with an understanding or agreement that the plaintiff should not remove the goods from the auction and commission house of Harris & Breeden until the balance of the purchase money due Flowers for the goods had been paid, and that the first proceeds of the sales of the goods were to be paid to and retained by Harris & Breeden, and by them paid over to Flowers, then I say that the defences set up and relied on in the paragraphs of defendant's answer above quoted are not made out.

"Some three or four days after the application was made and the questions answered upon which the policy was issued, the plaintiff signed a written paper, in evidence before you, in these words: (See Exhibit A, ante p. 40, Tr.) It is conceded this paper was not in existence at the date of the application, and when the questions accompanying the application were answered and the policy issued.

"In reference to this paper, I say to you that it constitutes no defence to this action.

"The defendant's counsel concede that this paper correctly expresses the agreement or arrangement between the plaintiff and Flowers, in reference to the means and manner of payment of the balance of the purchase money, except that clause relating to advances that might be made by Harris & Co., the auctioneers, which is not material to the case.

"Now, if you find from the evidence that this paper does express correctly the verbal agreement between plaintiff and Flowers in relation to the payment of the balance of the purchase money, and that such understanding or agreement existed at the time the plaintiff made his application for insurance, I instruct you that the existence of such verbal agreement at the date of the application and issuance of the policy does not support the paragraphs of the defendant's answer which I have read, and does not avoid the policy, and constitutes no defence in this action.

* * * * * *

"But a valuation made by the insured honestly and in good faith, and with no purpose or intention to mislead or defraud the insurance company, though excessive and much beyond the actual cash value of the property, will not avoid the policy or defeat a recovery thereon in case of loss.

"It is a question of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery of the policy. An over-valuation of the goods by the insured is not in itself sufficient proof of a fraudulent valuation on the part of the assured, but it is a circumstance to be taken into consideration with the other evidence and circumstances in the case, in the determination of the question of good faith on the part of the assured.

"And if the valuation was grossly, enormously in excess of

the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error.

"The value of the goods in the determination of this issue is the fair market value in the usual and ordinary course of business in the place and at the time they were insured."

ASSIGNMENT OF ERRORS.

1. The court below erred in refusing to give the first, second, third, fourth, seventh and eighth instructions asked by defendant.

2. The court below erred in giving so much of the instruction on its own motion as was excepted to by the defendant, and which is above set out in this brief, word for word.

ARGUMENT FOR PLAINTIFF IN ERROR.

The policy was issued on certain conditions, which were printed and annexed to it. One of these was one of universal use in all fire policies, and most essential to the protection of insurers, to-wit: That if the interest of the insured in the property was not absolute, *it must be so represented to the company, and expressed in the policy in writing, or otherwise the insurance shall be void.*

The plaintiff misrepresented the facts grossly. In his application, which was made his warranty, he covenanted that no one else was interested; also that there was no incumbrance on the property. He did this willfully, knowing that Flowers had an interest in the merchandise for more than half what it had cost him. This fact, which he concealed from the insurers, was an exceedingly material one; so much so that perhaps no fire policy is ever issued without containing stipulations on this subject. But whether material or not imports nothing, as the parties had agreed to make it so, and the insured made his warranty that the facts in this regard as represented by him were true.

"A *warranty* is a part of the contract, and must be exactly

and literally fulfilled. Being in the nature of a condition precedent, it is not a subject for discussion whether such condition be material or immaterial; it must be literally complied with, whether it be one or the other." *Flanders on Ins.*, 204, *and cases cited; Phillips' Ins., Sec.* 755; *Eddy Iron Foundry vs. Ins. Co.*, 1 *Cliff.*, 300; *Jeffries vs. Economical Ins. Co.; S. C. U. S. MS. opinion, last term.* The insured warranted that no other one was interested in the merchandise. The goods were placed in the possession of Harris & Breeden, auctioneers, with an agreement that the first proceeds of the sales should be applied to the payment of the debt due to Flowers. The insured, in his proof of loss, made oath as follows: "All the goods I bought remained with Harris & Co., in the auction store, from the day of the purchase by me until the day of the fire. I made an obligation with Harris & Co. to let the goods remain with them, and all the sales were to be paid over to Flowers on account of balance due him of $3100. *I had no disposition to remove the goods from Harris & Co.'s, but I could not have done so without their consent on the payment of Flowers' debt.*"

This was, therefore, a pledge, which is defined to be "a bailment of personal property as a security for some debt or engagement." *Story on Bailments, sec.* 286.

Blackstone says: "So also of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledger and the pledgee have a qualified, but neither of them an absolute property in them." 2 *Comm.*, 396.

Kent says: "The pawnee, upon delivery, has a special property in the thing pawned." 2 *Comm.*, 578. So the pawnee or pledgee may maintain trespass for an injury to the property in his possession. *Chitty Pl.*, 170; *see also Tyler on Usury and Pawns, p.* 557.

The insured also warranted that there was no incumbrance on the property. If a pledge for a debt is not an incumbrance on personal property, it is difficult to conceive of any method by which that species of property can be incumbered.

We do not find any case where a pledgor has insured prop-

erty as his own, asserting an absolute interest in himself and freedom of that interest from incumbrance; but there are many cases which have arisen where property insured was mortgaged, and the existence of the mortgage was concealed or denied. In many of these cases there was no express warranty, but there was misrepresentation or fraudulent concealment in not informing, or falsely informing, the underwriter of an existing incumbrance. And the cases are uniform. *Warner vs. Middlesex Ins. Co.*, 21 *Conn.*, 444; *Addison vs. Kentucky Ins. Co.*, 7 *B. Monroe*, 470; *Davenport vs. New England Ins. Co.*, 6 *Cushing*, 340; *Lowell vs. Middlesex Ins. Co.*, 8 *Id.*, 127; *Friesmuth vs. Agawam Ins. Co.*, 10 *Id.*, 588; *Hayward vs. New England Ins. Co.*, *Id.*, 444; *Loehner vs. Home Ins. Co.*, 17 *Mo.*, 247; *Brown vs. Peoples' Ins. Co.*, 11 *Cushing*, 280; *Packard vs. Agawam Ins. Co.*, 2 *Gray*, 334; *Bowditch Ins. Co. vs. Winslow*, 3 *Id.*, 415; *S. C.*, 8 *Id.*, 38; *Battles vs. York County Ins. Co.*, 41 *Me.*, 208; *Smith vs. Empire Ins. Co.*, 25 *Barb.*, 497; *Patten vs. Merchants' Ins. Co.*, 38 *N. H.*, 338; *Richardson vs. Maine Ins. Co.*, 46 *Me.*, 394; *Hutchins vs. Cleveland Ins. Co.*, 11 *Ohio St.*, 477; *Gahagan vs. Union Ins. Co.*, 43 *N. H.*, 176; *Murphy vs. People's Ins. Co.*, 7 *Allen*, 239; *Towne vs. Fitchburg Ins. Co.*, *Id.*, 51; *Jacobs vs. Eagle Ins. Co.*, *Id.*, 132; *Pennsylvania Ins. Co. vs. Gottman*, 48 *Penn. St.*, 151; *Muma vs. Niagara Ins. Co.*, 22 *Up. Can.*, Q. *B.*, 214; *Shoemaker vs. Glen's Falls Ins. Co.*, 60 *Barb.*, 84; *Abbott vs. Shawmut Ins. Co.*, 3 *Allen*, 213; *Gould vs. York Ins. Co.*, 47 *Me.*, 403; *Draper vs. Charter Oak Ins. Co.*, 2 *Allen*, 569.

There are some differences between a mortgage and a pledge, but none which renders any of the authorities above cited inapplicable to this case. Indeed, the same principle applies in this case *a fortiori;* for in all the cases above cited, the insurer was in the absolute possession of the property.

Possession of personal property is, in the contract of insurance, a very important point. The contract is one of mutual trust. *Emerigon, ch.* 1, *sec.* 5; *McLanahan vs. Universal Ins. Co.*, 1 *Pet.*, 170.

The character of the person in possession for carefulness, temperance, uprightness, or their reverse, as it will greatly affect the risk, must also largely influence the mind of the insurer, either to accept or reject the risk, or to fix the amount of the premium. A person of notoriously bad character in possession of goods, cannot get them insured at any price. The insurer has, therefore, the right to know the person having the custody of the goods. The false warranty, the false representation, the fraudulent concealment in this case had, therefore, an additional feature of injury to the underwriters to those which exist in the case of mortgages, where the insured has the actual possession and control of the property insured.

It is not only in regard to incumbrances that the rule applies, but any other false warranty, false representation or fraudulent exaggeration of the title of the insurer will make void the policy. (Columbia Ins. Co. vs. Lawrence, 2 Pet., 25; Mutual Life Ins. Co. vs. Mahon, 5 Call., 517; Catron vs. Tennessee Ins. Co., 6 Humph., 176; Brown vs. Williams, 28 Me., 262; Smith vs. Bowditch Ins. Co., 6 Cush., 448; Phillips vs. Knox Ins. Co., 20 Ohio, 174; Leathers vs. Ins. Co., 4 Foster, 259; Warner vs. Middlesex Ins. Co., 21 Conn., 444; Shaw vs. St. Lawrence Ins. Co., U. C. Q. B., 73; Wilbur vs. Bowditch Ins. Co., 10 Cush., 446; Walroth vs. St. Lawrence Ins. Co., 10 U. C. Q. B., 525; Brown vs. Gore Ins. Co., Id., 353; Marshall vs. Columbian Ins. Co., 7 Fost., 157; Reynolds vs. State Ins. Co., 2 Grant, 326; Merrill vs. Farmers' Ins. Co., 48 Me., 285; Abbott vs. Shawmut Ins. Co., 3 Allen, 213; Day vs. Charter Oak Ins. Co., 51 Me., 91; Fales vs. Conway Ins. Co., 7 Allen, 46; Birmingham vs. Empire Ins. Co., 42 Barb., 457; Pierce vs. Empire Ins. Co., 62 Id., 636; Security Ins. Co. vs. Bronger, 6 Bush., 146.

In several of these cases also there was no express warranty.

2. We are willing to concede that it is not every trifling over-valuation that will avoid a policy, but when the court charged that no over-valuation will have that effect unless it is

"grossly, *enormously*" in excess, we conceive that a new and unknown term was imported into the law. "Enormous" is a large word, applied mostly, and never with much accuracy, to miracles and prodigies, astronomical distances and geologic formations. The jury probably understood it as covering some vast and vague quantity—perhaps a few thousand times the real value of the property. It is impossible to suppose that the insured considered property which he had bought, partly by exchange and partly on a credit, for about $6000, to be of the value of $12,000. The truth is, that any *serious* over-valuation will avoid a policy. (Carpenter vs. American Ins. Co., 1 Story, 57; Catron vs. Tennessee Ins. Co., 6 Humph., 176; Wilbur vs. Bowditch Ins. Co., 10 Cush., 446; Hersey vs. Merrimack Ins. Co., 7 Foster, 149; Protection Ins. Co. vs. Hall, 15 B. Mon. 441; Babbitt vs. Liverpool Ins. Co., 66 N. C., 70; Carpenter vs. Providence Ins. Co., 16 Pet., 495.)

Respectfully,

U. M. ROSE,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 222.

THE FRANKLIN INSURANCE COMPANY OF PHILADELPHIA,
Plaintiff in Error,

vs.

JAMES L. VAUGHAN,
Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ALBERT PIKE, ROBT. W. JOHNSON, LUTHER H. PIKE,
Of Counsel for Vaughan.

WASHINGTON, D. C.:
W. H. MOORE, PRINTER, 511 ELEVENTH ST.
1876.

In the Supreme Court of the United States.

FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, PLANTIFF IN ERROR,

vs.

JAMES L. VAUGHAN, DEFENDANT IN ERROR.

Brief for Defendant in Error.

One Flowers being the owner of a stock of goods, in the auction house of Harris & Breeden, in Little Rock, Arkansas, sold the same to Vaughan, the defendant in error.

Vaughan bought the goods on Flowers' representations, and the original invoices of the goods passed to him with the goods on the purchase, said invoices showing the value of the goods to be $12,793.13.

Vaughan, to pay for the goods, let Flowers have certain real estate in Little Rock and Memphis, Tennessee, valued at $3,050.00, and was to pay in addition to such real estate $3,100.00 in money out of the proceeds of the first sales of the goods. (Record, p. 15.)

Vaughan received the possession of the goods and had the right to sell and direct and control the sale of the same, with this limitation, viz: that the goods were not to be removed from the house of Harris & Breeden until the balance of the purchase money due Flowers was paid, the first proceeds of the sales of the goods to be applied to the payment of the unpaid purchase money. (Record, p. 17.)

In addition to these goods purchased from Flowers, Vaughan had another small stock, bought of William Sillerlery, the value of which the invoice showed to be $500.00. (Record, p. 15.)

Vaughan, on the 29th day of March, 1873, the day on which

his purchase from Flowers was completed, insured these goods with the Company, plaintiff in error herein, against loss or damage to the amount of $2,500.00, his valuation of the goods being $12,000.00.

A fire occurred, the Company refused to pay, Vaughan brought suit, recovered judgment, and the Company has appealed to this Court.

On the trial the jury found the amount of goods destroyed by fire to be $7,204.00.

Argument for Defendant in Error.

The defending company claims that there was not exact and literal fulfillment of a warranty, and seeks to have a forfeiture declared, but makes no offer to return premium received.

It is quite astonishing what stimulating effect a fire has upon complaisant companies, and with what promptitude after one has occurred, and demand for compensation for losses suffered has been preferred they make discovery that their reserved rights have been invaded and that there has not been exact, literal fulfillment of warranty, which before and whilst seeking to secure premiums they were wholly unable to see.

In this case the defending company framed its questions to serve as guide-posts to indicate to the applicant for insurance the limits within which he was to confine his answers. It made them the rule for the measurement of the assured's warranty.

So that if it appears that the assured made literal answers to those questions, which the company was content to receive, and on which it issued its policy—answers responsive to the meaning he was given to understand those questions were intended to express—the company, not the assured, is the party to be charged with responsibility on the answers made, and this court will not be astute to discover grounds for declaring a forfeiture against the assured.

The insurers endeavor to avoid responsibility under the policy for alleged false representations by the assured.

Three are specified:

First: Asked if any other person was *interested* with him in the goods? He answered, no one. So far as the word is ambiguous,

it is to be construed against the company, which used it, and which could have made its question as definite as it pleased.

The goods had been *sold* by Flowers to Vaughan. The ownership had passed by the sale. The assured was sole proprietor. No person had an interest in the *property* of the goods *with* him. The right of Flowers was not an interest *in the goods*, but a right to have the proceeds of sales paid over to him, until the debt of Vaughan to him should be fully paid.

For the goods were clearly at the risk of Vaughan. When they were destroyed, it was wholly his loss. His debt to Flowers was not discharged by their destruction.

And Vaughan could well understand the question to mean whether any one had a proprietary interest with him, or was his partner. No one was any more *interested* than if he had bought the goods in New York, and owing part or the whole of the price, had agreed to deposit all proceeds of sales to the credit of his creditor or the vendor, until the goods should be entirely paid for. The *interest* of Flowers was an interest in the receipts of moneys, not in the goods themselves.

Second: Asked if there was any incumbrance on the goods? He answered, none. It is contended that the agreement gave Flowers a lien on them, for the unpaid purchase-money, by way of pledge. There was no pledge, because Flowers had no possession. If he had had possession, personally, or by agent, the goods would have been at his risk. The auctioneers were his agents to receive the proceeds of sale; but their possession was not his possession, any more than that of Vaughan would have been, in the case supposed of an agreement by *him* to sell and deposit the proceeds.

Vaughan had a right to suppose that the word *incumbrance* meant a mortgage or deed of trust. There was legally no incumbrance. That a man owes for goods, and agrees that as they are sold, the receipts shall go to the creditor until he is paid, is no *incumbrance*—in the legal meaning of the term. It made the goods worth none the less to Vaughan, nor his loss less, when they were destroyed. He had the right to suppose the word had this meaning; because, looking to the collocation of the words and the placing of the interrogation mark in the series of questions numbered nine—title Incumbrance—it is evident the com-

pany had given its own meaning to the word 'incumbrance,' and had restricted it to mortgages and deeds of trust. And the evidence adduced, is to the effect that at the time he answered the questions, he was asked if the goods were mortgaged; all which is ample proof, we think, that he was made to understand that the question had reference only to mortgages and deeds of trust.

Third. Over-valuation of the goods; of which it seems to have been considered sufficient proof, that they cost the assured about $6,700, and he estimated them at $12,000. But the value of goods to a dealer is their cost and the profit reasonably expected; as in damages are included the *lucrum cessans* as well as the *damnum emergens.* Sales at a sacrifice are common, and purchases are often made not only of goods, but of land, houses and all other property at half their value.

The jury, by agreement, found that when the goods were destroyed, after a part had been sold, what were destroyed were worth $7,204.00. Therefore, the stock was originally worth some thousands more than it cost the assured.

The plaintiff in his declaration tendered an issue on the allegation that some of the goods had been saved. The Company saw fit not to accept the issue. This Court will presume against forfeiture, that the Company admitted there were some goods saved, that they were of some value, sufficient to sustain with what had been sold, and what were actually destroyed, the assured's valuation of the whole.

ALBERT PIKE,
ROBERT W. JOHNSON,
LUTHER H. PIKE,
Of Counsel for Vaughan.